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June 17, 1996

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JUN 17 1996

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: In the Matter of Implementation of Section 34(a)(1)  
of the Public Utility Holding Company Act of 1935,  
as Added by the Telecommunications Act of 1996  
(GC Docket No. 96-101, FCC 96-192)

Dear Mr. Caton:

Enclosed please find the Comments of the City of New Orleans  
regarding the above-referenced file. Also enclosed are two  
additional copies of the comments, which we ask that you stamp  
and give to the messenger for return to our office.

Respectfully submitted,



Sherry A. Quirk  
Montina M. Cole  
Attorneys for the City of  
New Orleans

Enclosures

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UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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JUN 17 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of Implementation           )  
of Section 34(a)(1) of the                )  
Public Utility Holding Company           )  
Act of 1935, as Added by the             )  
Telecommunications Act of 1996            )  
GC Docket No. 96-101,  
FCC 96-192

COMMENTS OF THE CITY OF NEW ORLEANS

Pursuant to the Notice of Proposed Rulemaking of the Federal Communications Commission ("Commission"),<sup>1/</sup> the City of New Orleans, Louisiana ("New Orleans," or "the City") hereby timely files comments in the above-captioned docket. New Orleans is pleased to submit comments on the Commission's proposed rulemaking ("Proposed Rule") that would implement new § 34(a)(1) of the Public Utility Holding Company Act of 1935 ("PUHCA"),<sup>2/</sup> which permits utility holding companies registered under PUHCA to invest in exempt telecommunications company ("ETC") entities.

I. INTRODUCTION

New Orleans largely supports the Commission's Proposed Rule, but urges the Commission to make minor adjustments to facilitate effective monitoring and regulation of ETCs, which represent unprecedented investments by registered utility holding companies. New Orleans recommends that the Commission reexamine the proposed filing requirements for registered companies, as

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<sup>1/</sup> In the Matter of Implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935, as Added by the Telecommunications Act of 1996, 61 Fed. Reg. 24743 (May 16, 1996).

<sup>2/</sup> See 15 U.S.C. § 79 et seq., as amended by § 103 of the Telecommunications Act of 1996, (the "1996 Act") Pub. L. No. 104-104, 110 Stat. 56 (1996).

well as the limits on the content of comments which may be filed regarding applications for ETC status. Minor changes to the Proposed Rule will help ensure that the Commission has sufficient information upon which to make ETC determinations, and will facilitate state-level regulators' monitoring of these new investments, on behalf of captive retail ratepayers.

## II. STATEMENT OF INTEREST

The City of New Orleans regulates the retail rates of two utility operating companies, Entergy New Orleans (formerly, "New Orleans Public Service Inc.") and Entergy Louisiana (formerly, "Louisiana Power & Light Company") operations in the Algiers section of New Orleans. Entergy New Orleans and Entergy Louisiana are utility subsidiaries of the Entergy Corporation ("Entergy"),<sup>3/</sup> a multi-state utility holding company registered under PUHCA. New Orleans is vested with regulatory authority over public utilities operating within the City.<sup>4/</sup>

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<sup>3/</sup> The Entergy holding company system operates in the states of Louisiana, Mississippi, Arkansas and Texas. Entergy Mississippi (formerly, "Mississippi Power and Light Company"), Entergy Arkansas (formerly, "Arkansas Power & Light Company"), Gulf States Utilities ("GSU"), Entergy New Orleans and Entergy Louisiana comprise the utility operating companies of the Entergy system. In addition to these five operating companies, Entergy has several other domestic subsidiaries, such as Entergy Enterprises, Inc. ("EEI"), a non-utility investment development subsidiary, Entergy Services, Inc. ("ESI"), a service company subsidiary, and Entergy Operations, Inc. ("EOI"), a nuclear plant operations and management services subsidiary. Entergy also has subsidiaries through which the company makes foreign investments in countries such as Argentina, China, Peru and Australia. And, Entergy recently obtained ETC status for its telecommunications subsidiary, Entergy Technology Company. See Entergy Technology Co., FCC 96-163 (issued April 12, 1996).

<sup>4/</sup> New Orleans Home Rule Charter §§ 3-130 and 4-1601 (Charter effective May 1, 1954, as amended through January 1, 1996).

In its capacity as a retail regulator and for purposes of this rulemaking proceeding, the City represents the New Orleans consumers of these two Entergy utility operating companies. Because of the proposed corporate relationship between Entergy's ETC entity, Entergy Technology Company, Entergy New Orleans, Entergy Louisiana and other Entergy's other various subsidiaries, New Orleans has a direct interest in this matter.

### III. DISCUSSION

#### A. Notice and Comment Proceedings Regarding Applications for ETC Status Are Necessary to Protect the Public Interest

New Orleans fully supports the Commission's proposal to provide notice and request comments regarding ETC applications filed by registered utility holding companies. Investment by registered companies in telecommunications subsidiaries is a new phenomenon which poses new issues for state and federal authorities who regulate the companies, and also for captive retail consumers who are served by utility subsidiaries of registered companies.

Public notice and comment will assist state-level regulators, such as New Orleans, in monitoring these new investments. Given the utility industry's track record on diversification, effective monitoring is critical.<sup>5/</sup> Therefore,

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<sup>5/</sup> For example, a 1992 survey indicated that the financial results of utility diversification have been "horrendous in the aggregate." See Charles M. Studness, Earnings from Utility Diversification Ventures, Public Utilities Fortnightly, Sept. 1, 1992, 28-29. Over the course of six years, the average utility return on equity averaged -1.1 percent. Id. (emphasis added). Diversification failures include those experienced by utility holding companies which are exempt from regulation under PUHCA. (continued...)

it is in the public interest to provide notice and request comments regarding applicants' intent to create ETCs, unprecedented entities that will engage in unprecedented diversified investments on behalf of registered companies. Failure to provide for public notice and comment could be detrimental to the interests of retail ratepayers and other interested persons, in contravention of the intent of PUHCA.<sup>5/</sup>

Notice and comment procedures regarding applications for ETC status are consistent with the intent of Congress. Commentors can provide information regarding applications which may aid the Commission with its determinations. Notice and comment is required by another federal agency, the Federal Energy Regulatory

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<sup>5/</sup>(...continued)

For instance, the FPL Group, Inc., parent company of Florida Power & Light Company, invested in cable television, among other nonutility businesses, and suffered significant losses. Tucson Electric Power, CMS Energy Corporation, Hawaiian Electric Industries, Pacific Enterprises and other utilities have experienced diversification failures.

We note that it is not New Orleans' position that the Commission should second-guess the "public interest merits" of registered utility holding companies entering into the telecommunications industry. Proposed Rule at 24744. Indeed, New Orleans supports registered company diversification in telecommunications, but only with appropriate safeguards to ensure that captive retail ratepayers are protected from diversification failures and other risks, including cross-subsidization. New Orleans submits that such facts, issues which are very important to retail utility ratepayers, are essential to understanding the issues presented by utility diversification into telecommunications. Diversification risks are not mentioned in the Commission's rulemaking, although the Commission references certain potential benefits. See, e.g., Proposed Rule at 24745 (Commission references benefits of certain energy services, and other factors cited in Senate Report on telecommunications legislation).

<sup>6/</sup> PUHCA serves to protect against a "lack of effective public regulation." See 15 U.S.C. § 79a(b) (1994).

Commission ("FERC"), that enforces a similar PUHCA provision. The Commission has noted the similarities of the two provisions.<sup>7/</sup> In its order establishing a final rule on applicant filing requirements, the FERC noted and agreed with commentors that, "interested parties may be able to provide the Commission with information concerning whether an application is accurate and whether an applicant meets the statutory requirements for EWG status."<sup>8/</sup> Lastly, as the Commission has noted, "there is [no] prohibition on the Commission's discretion" to provide for notice and comment regarding applications for ETC status.<sup>9/</sup> New Orleans urges the Commission to make final its "tentative conclusion to allow comments"<sup>10/</sup> regarding applications for ETC status.

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<sup>7/</sup> "We note that PUHCA section 34(a)(1) is similar to the 'exempt wholesale generator' paradigm of PUHCA section 32 which permits, inter alia, public utility holding companies to enter into the independent power production business." Proposed Rule at 24745. Indeed, the statutory language of the ETC provision of PUHCA very closely and intentionally parallels the exempt wholesale generator ("EWG") provision of PUHCA, largely tracking the language verbatim. See 15 U.S.C. § 79z-5a(a)(1) (§ 32(a)(1)) (EWG section); and § 103 of the 1996 Act (§ 34(a)(1)) (ETC section).

<sup>8/</sup> See 58 Fed. Reg. 8897, 8898-8899 (Feb. 18, 1993) (final rule); order on rehearing, 58 Fed. Reg. 21250 (Apr. 20, 1993).

<sup>9/</sup> Proposed Rule at 24746.

<sup>10/</sup> Id.

B. Comments Should Not be Limited Solely to Addressing Information that Registered Companies Choose to Include in Applications for ETC Status

The Commission should not solely "limit such comments to the accuracy and adequacy of the representations contained in the applications."<sup>11/</sup> Importantly, commentors may have additional information, related to the requirements of obtaining ETC status and related to the Commission's regulation of these new entities, that the Commission and the public should be allowed to know. Interested parties should not be barred from addressing such information, simply because a registered company did not include the information in its application. For example, commentors may wish to inform the Commission of impermissible activities (not referenced in an application) in which the ETC may be involved, that may violate the 1996 Act. Persons with knowledge of such potential violations should be encouraged to bring information to the attention of the Commission, which is charged by Congress with enforcing this law.

Allowing comments to be provided regarding other relevant information will prevent any uninformed "rubber stamping" of whatever information an applicant may choose to submit. An underinclusive policy on the content of comments regarding applications for ETC status would limit the Commission's ability to gain information bearing on its ultimate decision on ETC status. Registered companies should not be enabled to improperly

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<sup>11/</sup> Id.

gain ETC status, nor to misuse ETC status, in contravention of the intent of Congress.

C. Applicants Should Include Information on Proposed State-Jurisdictional Activities to Facilitate Effective Regulation

New Orleans generally supports the Commission's proposal to require applicants to provide certain information, including a brief description of planned telecommunications activities<sup>12/</sup> and certification that required statutory criteria are met -- similar to FERC's requirements under the analogous exempt wholesale generator provision of PUHCA.<sup>13/</sup> However, New Orleans believes that two additional requirements should be added. First, New Orleans submits that the applicants' brief description should also indicate whether any planned activities require approval of a state-level retail regulator. Second, applicants for ETC status should indicate that approval has been obtained for any proposed state-jurisdictional transactions. Alternatively, in instances where state approval has not yet been obtained, the applicants should be required to certify that required state approvals are being pursued.

These further requirements will assist retail regulators with monitoring proposed ETCs, and are consistent with PUHCA's intent that consumers be protected. New Orleans emphasizes that

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<sup>12/</sup> However, a brief description should contain specific, meaningful information, as opposed to, for example, a mere recitation of the statute's language regarding the broad categories of telecommunications activities.

<sup>13/</sup> The Commission "believe[s] that similar filing requirements should be required under section 34(a)(1)." Proposed Rule at 24746.



these two additional requirements would not present any barriers to entry into the telecommunications industry, nor would such disclosure prove burdensome to registered companies. As registered companies begin to compete in unfamiliar territory, under new and untested statutory provisions, effective monitoring is crucial.

Without access to sufficient information and effective monitoring of utility telecommunications activities, ratepayers may be exposed to unwarranted risk. State regulators, such as New Orleans, must obtain relevant information about proposed investments by registered companies to facilitate the exercise of retail authority over state-jurisdictional transactions. An example of state-jurisdictional activity is provided within the Entergy utility holding company system. Entergy Technology Company, an Entergy subsidiary that has been granted ETC status by the Commission,<sup>14/</sup> intends to provide excess Entergy fiber optic capacity to nonassociate companies. The Entergy fiber system is essential to utility functions and has been financed through rates charged to captive utility ratepayers, including those in New Orleans. Pursuant to the 1996 Act, such arrangements involving the disposition of utility assets for ETC purposes require the approval of retail regulators, such as the City.<sup>15/</sup> Requiring registered companies to provide basic

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<sup>14/</sup> Entergy Technology Company, FCC 96-163 (issued April 12, 1996).

<sup>15/</sup> See § 103(b) of the Act (§ 34(b) of PUHCA).

information regarding state-jurisdictional activity will assist retail regulators in monitoring and regulating such transactions.

D. Any Consolidated Application of Holding Company Affiliates Must Include Sufficient Information Regarding Each Affiliate

Lastly, in instances where more than one holding company affiliate seeks ETC status, any consolidated application must contain adequate information regarding each affiliate, including the proposed activities of each affiliate. Comprehensive or summary descriptions or representations would not permit the Commission to make necessary findings regarding each of the entities seeking ETC status. Commission determinations should not be based on incomplete information. Therefore, New Orleans fully agrees with the Commission that, "[i]n such a case, the application should contain for each affiliate sufficient information as required by [the Commission's] rules to make a separate ETC determination for that affiliate."<sup>16/</sup>

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, New Orleans respectfully requests that the Commission adopt the proposals discussed herein, to help protect the interests of ratepayers and facilitate effective enforcement of PUHCA, as amended by the 1996 Act.

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<sup>16/</sup> Proposed Rule at 24746 (emphasis added).

All correspondence should be directed to the Counsel and representatives of New Orleans listed below.

Respectfully submitted,

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Dated: June 17, 1996

CERTIFICATE OF SERVICE

The undersigned verifies that copies of the foregoing  
Comments of the City of New Orleans were served upon the  
following, by first-class mail, postage prepaid.

Dated at Washington, D.C., this 17th day of June, 1996.

  
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